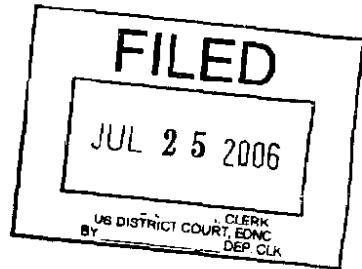


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Criminal No. 5:03-CR-290-1-FL
Civil No. 5:05-CV-357-FL



JUAN ADARELL CROMARTIE,)
Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,)
Respondent.)

O R D E R

Petitioner, a federal inmate, filed this *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Presently before the court are petitioner's request to voluntarily dismiss his petition and his motion for appointment of counsel. Respondent has not filed a response to either motion. Also before the court is the motion to dismiss, or, in the alternative, for summary judgment of respondent the United States of America (hereinafter "respondent"). These matters are ripe for adjudication.

An action may be dismissed voluntarily by the petitioner without order of the court by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment. See Fed. R.Civ. P. 41(a)(1). Otherwise an action shall not be dismissed on the petitioner's request except upon an order of the court. See Fed. R.Civ. P. 41(a)(2).

At this point in the proceedings, respondent has filed a motion to dismiss, or, in the alternative, for summary judgment. Because respondent has responded to petitioner's petition, his petition may only be voluntarily dismissed pursuant to Rule 41(a)(2), which permits voluntary dismissal "upon such terms and conditions that the court deems proper." A petitioner's motion

under Rule 41(a)(2) should not be denied absent substantial prejudice to the respondent. Andes v. Versant Corp., 788 F.2d 1033, 1036 (4th Cir. 1986).

It appears that petitioner seeks to dismiss his petition because he has been unable to obtain counsel. The court finds this reasoning to be consistent with Rule 41(a)(2). Therefore, petitioner's request for voluntary dismissal (DE # 43) is GRANTED. Accordingly, respondent's motion to dismiss, or, in the alternative, for summary judgment (DE # 37) and petitioner's motion for appointment of counsel (DE # 36) are DENIED as MOOT.

SO ORDERED, this the 21st day of July, 2006.



LOUISE W. FLANAGAN
Chief United States District Judge